RECENT CASES

ADMINISTRATIVE LAW — APPLICABILITY OF THE COMMON LAW RULES OF EVIDENCE IN PROCEEDINGS BEFORE ADMINISTRATIVE TRIBUNALS. — A buyer of goods refused to accept delivery, alleging that the cloth was not of the color ordered. The dispute was referred to arbitration. The arbitrators took the evidence of each side in the absence of the other, and made an award in favor of the seller. The buyer moved to set aside the award. *Held*, that the award be set aside. *W. Ramsden & Co.* v. *Jacobs*, [1922] 1 K. B. 640.

For a discussion of the principles involved, see NOTES, *supra*, p. 79.

ADMIRALTY — JURISDICTION — IMMUNITY OF A VESSEL FROM LIBEL AFTER TRANSFER FROM A SOVEREIGN TO A PRIVATE PARTY. — The Belgian vessel, *Tervaete*, while owned by the Belgian Government and while engaged in public duties, negligently collided with another vessel. Subsequently it was transferred to private owners and was libeled for the injury. *Held*, that judgment be entered for the libellant. *The Tervaete*, [1922] P. 197.

It is a familiar doctrine that a sovereign, either domestic or foreign, cannot be sued without its consent. This principle applies to suits against the sovereign or against its property. *The Exchange*, 7 Cranch (U. S.) 116; *Parlement Belge*, 5 P. D. 197; *United States* v. *Clark*, 8 Pet. (U. S.) 436, 444. But in the principal case the sovereign was not sued. The theory of the court was that the injury gave rise to rights the remedy for which, though dormant while the vessel was owned by the government, sprang to life when it was transferred to private hands. It would seem that this result could be reached more readily in this country than in England. Here a libel is regarded as a suit against the vessel itself, and not against its owner. *John G. Stevens*, 170 U. S. 113, 120. See 35 HARV. L. REV. 330. Yet the United States Supreme Court in a recent case held the contrary. *The Western Maid*, U. S. Sup. Ct., Oct. Term, 1921, Nos. 21, 22, 23. This is hardly in keeping with previous cases in which the court has spoken of a right arising without a remedy. *The Siren*, 7 Wall. (U. S.) 152, 155; *The Davis*, 10 Wall. (U. S.) 15. See *United States* v. *Wilder*, 3 Sum. 308 (1st Circ.). See Charles H. Weston, "Actions Against the Property of a Sovereign," 32 HARV. L. REV. 266. This right is enforceable by counterclaim when the government takes affirmative action. *United States* v. *Ringold*, 8 Pet. (U. S.) 150. Considerations of policy alone forbid its enforcement when the sovereign has taken no action.

AGENCY — MASTER AND SERVANT — AUTOMOBILES — LIABILITY OF THE OWNER OF A FAMILY CAR. — The defendant's minor stepdaughter, driving the family car with his permission, and for her own pleasure, negligently injured the plaintiff. The trial court directed a verdict for the defendant. *Held*, that the judgment be reversed. *Jones* v. *Cook*, 11 S. E. 828 (W. Va.).

The reasoning of this case is that since the car was provided for the pleasure of members of the family, and was being used for this purpose, the driver was acting as the agent or servant of the owner, within the scope of his employment. Absurd as is the fiction that the gift of the privilege of using a chattel makes the donee use it as a servant of the owner, it is supported by the weight of authority. *Lynch* v. *Dobson*, 188 N. W. 227 (Neb.); *King* v. *Smythe*, 140 Tenn. 217, 204 S. W. 296; *Bald-*

win v. *Parsons*, 186 N. W. 665 (Iowa); *Graham* v. *Page*, 300 Ill. 40, 132 N. E. 817. *Contra*, *Arkin* v. *Page*, 287 Ill. 420, 123 N. E. 30; *Doran* v. *Thompson*, 76 N. J. L. 754, 71 Atl. 296; *Van Blaricom* v. *Dodgson*, 220 N. Y. 111, 115 N. E. 443. Neither policy, nor analogy clearly supports this "family purpose doctrine." Where one member of the family, or the chauffeur, drives another member of the family, *respondeat superior* clearly applies. *Moone* v. *Mathews*, 227 Pa. St. 488, 76 Atl. 219; *McNeal* v. *McKain*, 33 Okl. 449, 126 Pac. 742; *Dennison* v. *McNorton*, 228 Fed. 401 (6th Circ.). But where the car is loaned to the chauffeur, it does not apply. *Mogle* v. *Scott Co.*, 144 Minn. 173, 174 N. W. 832. Nor should it be warped to apply to the indistinguishable situation of a loan to a relative. See 28 HARV. L. REV. 91. The whole question resolves itself into a weighing of conflicting considerations of policy. See Edward W. Hope, "The Doctrine of the Family Automobile," 8 AM. BAR ASS'N JOUR. 359, 365; 20 COL. L. REV. 213. In the situation here presented this should be left to the legislature. See 28 HARV. L. REV. 91. It can hardly be doubted that a statute making the owner of an automobile liable for the injuries caused by it through negligent management by persons licensed by the owner to drive it would be constitutional. See 34 HARV. L. REV. 434.

APPEAL AND ERROR — REVERSING JUDGMENT FOR ERROR TO WHICH NO EXCEPTION HAD BEEN TAKEN. — In a trial for manslaughter the evidence was close. The prosecuting attorney introduced irrelevant evidence and improper argument and secured erroneous instructions, all grossly prejudicial to the defendant. Counsel for the defendant did not object or except through ignorance of trial procedure. *Held*, that the errors will be considered on writ of error. *People* v. *Gardiner*, 135 N. E. 422 (Ill.).

Unless a party reserves a question for review by exception in the trial court, he cannot as of right raise the question on review. In most jurisdictions the appellate court cannot in any event notice questions not properly raised below. But the federal appellate courts may notice a plain error, though it was not assigned. *Oppenheim* v. *United States*, 241 Fed. 625 (2nd Circ.). See RULES OF U. S. CIRC. CT. OF APP., no. 11, 150 Fed. xxv, xxvii. A few jurisdictions have a similar rule in criminal cases. *People* v. *Weiss*, 129 App. Div. 671, 114 N. Y. Supp. 236. Others restrict the application of the rule to capital cases. *People* v. *Brott*, 163 Mich. 150, 128 N. W. 236. Distinctions are drawn between felony and misdemeanor cases. There are also numerous variations of this practice in civil cases. *Cf. Howard* v. *Payne*, 112 S. E. 437 (S. C.). The divergence of such procedure from orthodox common law principles is evident. The objection may be raised that counsel, to have an "anchor to windward" in case of an adverse verdict, might exploit the rule by injecting error into the record through failure to object to erroneous rulings. But since the appellant cannot raise an unreserved point as of right, and since the court will notice such points only in extreme cases, the step taken by Illinois seems properly liberal.

BANKRUPTCY — PREFERENCES — RIGHT TO RESCIND TRANSACTION FOR FRAUD. — The defendants through the fraudulent misrepresentations of one Ponzi gave Ponzi money in return for his notes. Discovering the fraud within four months prior to bankruptcy, they rescinded, and were paid back the amount of their original contributions. The trustee in bankruptcy of Ponzi now sues to recover these sums on the ground that their payment was a preference. *Held*, that it was no preference; the money returned could be traced as being part of a mass which included their original contributions, and that even if it could not be traced, *cestuis*